

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

ROBERT A. RUCHO, in his official
capacity as Chairman of the North
Carolina Senate Redistricting Committee
for the 2016 Extra Session and Co-
Chairman of the Joint Select Committee
on Congressional Redistricting, *et al.*,

Defendants.

CIVIL ACTION
No. 1:16-CV-1026-WO-JEP

THREE-JUDGE COURT

League of Women Voters of North
Carolina, *et al.*,

Plaintiffs,

v.

Robert A. Rucho, in his official capacity
as Chairman of the North Carolina
Senate Redistricting Committee for the
2016 Extra Session and Co-Chairman of
the 2016 Joint Select Committee on
Congressional Redistricting, *et al.*,

Defendants.

CIVIL ACTION
No. 1:16-CV-1164-WO-JEP

THREE JUDGE COURT

LEGISLATIVE DEFENDANTS' RESPONSE TO COURT ORDER

On July 16, 2018, the court entered an order directing Plaintiffs, among other things, to make several expert witnesses available for deposition by Legislative Defendants prior to July 31, 2018. (D.E. 133, pp. 4-5).

In its Order, the court stated that the United States Supreme Court had issued its mandate in this case on July 13, 2018. (*Id.* at p. 4) Respectfully, that was incorrect. The Supreme Court rendered its opinion in this matter on June 25, 2018. U.S. Supreme Court R. 45 states that the Supreme Court retains jurisdiction over an appeal for twenty-five (25) days after entry of a judgment, to allow time for rehearing motions, before it relinquishes jurisdiction to a lower court through entry of a mandate or the provision of a certified copy of its judgment. *See* U.S. Sup. Ct. R. 45(2)-(3). Thus, pursuant to R. 45, the earliest the Supreme Court would have issued its mandate then is July 20, 2018, not July 13, 2018.

Appellate courts retain jurisdiction over an appeal until they have issued a mandate and a lower court is generally without jurisdiction to act in the matter, despite a decision by the appellate court, until the mandate is issued. *See e.g. Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645, 649 (11th Cir. 1990); *U.S. v. Cook*, 592 F.2d 877,880 (5th Cir.), *cert denied*, 442 U.S. 921 (1979) (appellate “court retains jurisdiction over an appeal until it has issued a mandate to implement its disposition”). A review of the Supreme Court dockets for other recent cases decided by a three-judge panel, like this one, further confirms that the Supreme Court has not yet relinquished jurisdiction. In *North Carolina, et al. v. Covington*, the Supreme Court issued its opinion on June 5, 2017, however it did not issue its mandate until twenty-five (25) days later on June 30,

2017. See *North Carolina, et al. v. Covington*, No. 16-1023 (U.S. Feb. 23, 2017), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-1023.htm>. When the Court issued its mandate, the docket clearly reflected that it had done so with an entry denoted “JUDGMENT ISSUED.” *Id.* Correspondingly, the Middle District docket for *Covington* reflects that on June 30, 2017 it also received “certified” copies of the Supreme Court’s judgment per the requirements of R. 45. See D.E. 158 & 159, *Covington et al. v. N.C.*, No. 1:15-cv-00399 (M.D.N.C. Jun. 30, 2017).

In contrast, there is no “JUDGMENT ISSUED” entry on the Supreme Court’s docket for this case. See *Rucho et al. v. Common Cause et al.*, No. 17-1295 (U.S. Mar. 14, 2018) <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1295.html>. Further, this court’s docket does not show any entries reflecting receipt of “certified” copies of the Court’s judgment. This is because the Supreme Court has not issued its mandate relinquishing jurisdiction back to this court.

Because the Supreme Court did not issue its mandate on July 13th, this Court did not have jurisdiction to enter its July 16, 2018 Order. Accordingly, Legislative Defendants respectfully request that the Court vacate its Order and reissue it with new deadlines at the proper time following the Supreme Court’s actual issuance of its mandate.

Finally, Legislative Defendants respectfully renew their request that they be allowed not only to depose Plaintiffs’ expert witnesses, but also Plaintiffs themselves. Likewise, as requested in their prior response, Legislative Defendants request that they be allowed to present counter expert testimony to all new opinions provided by Plaintiffs’

experts at deposition or in declarations filed with this Court. In order for this to be a meaningful opportunity, Legislative Defendants request that the evidentiary record be reopened in this matter and the Court schedule a new trial after a reasonable discovery period of at least two (2) months.

Respectfully submitted, this the 17th day of July, 2018.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **LEGISLATIVE DEFENDANTS' RESPONSE TO COURT ORDER** has been electronically filed with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 17th day of July, 2018.

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